BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF CIRCUIT COURT

The decision of the Circuit Court of Appeals for the Tenth Circuit, from which this appeal is taken, was filed on November 16, 1942 and is printed on pages 17 to 22 of the Record, and is reported in 131 Fed. (2) 932.

STATEMENT OF THE CASE

The facts of the case are set forth in the Petition herein. (See pages 1 to 5.)

JURISDICTION

The jurisdiction of this Court is invoked under Section 240, Judicial Code, as amended; 28 U.S.C.A. 347.

STATEMENT OF ERRORS

1. The Circuit Court of Appeals erred in holding that the Defendant below, Cort A. Rosenhan, violated the requirements of Title VI of the Civil Aeronautics Act of 1938 and paragraph 60.31 (a) of the Civil Air Regulations and Traffic Rules as amended to May 31, 1938.

2. The Circuit Court of Appeals of the Tenth Circuit erred in holding that, under the allegations of the pleadings in the Court below, the Act under which judgment was rendered against the Defendant and the rules promulgated thereunder, are not in violation of the Tenth Amendment to the Constitution of the United States.

ARGUMENT

The issues to be determined arise upon the Complaint, the Answer, and a Motion for Judgment upon the pleadings. We are inclined to agree with the statement contained in the opinion of the United States Circuit Court of Appeals for the Tenth Circuit that the pleadings as cast, present the bare legal questions as to whether the Congress of the United States may in the exercise of its commerce powers, by its definition of interstate air commerce, include within its scope "any operation or navigation of air craft within the limits of any civil air way" (52 Stat. 977; 499 U.S.C.A. 403 [3]), and thereby forbid the intrastate operation of a civil aircraft within any area which may be designated by a federal agency as a "civil air way," unless there is currently in effect an airworthiness certificate issued by the duly constituted federal authority, and whether the state certificate of airworthiness meets the requirements of the federal Act.

ARGUMENT I

UNDER THE ALLEGATIONS OF THE DEFENDANT'S ANSWER AND AMENDED ANSWER THE CERTIFICATE OF AIRWORTHINESS ISSUED UPON THE DEFENDANT'S PLANE BY THE UTAH STATE AERONAUTICS COMMISSION MEETS THE REQUIREMENTS OF THE FEDERAL CIVIL AERONAUTICS ACT OF 1938 AND THE RULES PROMULGATED THEREUNDER.

Section 610 (a) of the Civil Aeronautics Act of 1938 (Public No. 706), which the Defendant is accused of violating, provides in part:

"It shall be unlawful—

"(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an air worthiness certificate, or in violation of the terms of any such certificate; * * *."

Paragraph 60.31 (a), of the Civil Air Regulations, is practically the same as the statutory section quoted above. It will be observed that neither of these sections make any requirement regarding who shall issue the airworthiness certificate. So far as these sections are concerned it, therefore, appears that an airworthiness certificate issued by any competent authority should be sufficient to meet the requirements of the statute.

Section 603 (c) of the Civil Aeronautics Act of 1938, provides as follows:

"The registered owner of any aircraft may file with the Authority an application for an airworthiness certificate for such aircraft. If the Authority finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, it shall issue an airworthiness certificate. The Authority may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations as are required in the interest of safety. Each such certificate shall be registered by the Authority and shall set forth such information as the Authority may deem advisable. The certificate number, or such other individual designation as may be required by the Authority, shall be displayed upon each aircraft in accordance with regulations prescribed by the Authority."

It will be observed from an examination of the foregoing section that the language is permissive and not mandatory in nature. It provides that an owner of an aircraft *may*, not that he *must*, file with the Authority an application for an airworthiness certificate. Clearly, therefore, this section is not mandatory and exclusive, but rather is merely directory and permissive.

The following language in this regard is found in paragraph 262 of Crawford, on Statutory Construction:

> "Ordinarily the words 'shall' and 'must' are mandatory, and the word 'may' is directory, although they are often used interchangeably in legislation. This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legislature. Nevertheless, it will always be presumed by the court that the legislature intended to use the words in their usual and natural meaning. If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature, then words which ordinarily are mandatory in their nature will be construed as directory, or vice versa. . In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the words 'shall' and 'must' to be directory, they should be given that meaning. Similarly, under the same circumstances, the word 'may' should be given a mandatory meaning, and especially where the statute concerns the rights and interests of the public, or where third persons have a claim de jure that a power shall be exercised, or whenever something is directed to be done for the sake of justice or the public good, or is necessary to sustain the statute's constitutionality.

> "Yet the construction of mandatory words as directory and directory words as mandatory should not be lightly adopted. The opposite meaning should be unequivocally evidenced before it is accepted as the true meaning; otherwise, there is considerable danger that the legislative intent will be wholly or partially defeated."

Section 7, Chapter 10, Laws of Utah, 1937, as amended by Chapter 12, Laws of Utah, 1939, provides as follows:

> "It shall be unlawful for any person to operate, pilot or navigate, or cause or authorize to be operated, piloted or navigated within this state any civil aircraft unless such aircraft has a currently effective certificate of registration issued either by the government of the United States, or the Utah State Aeronautics Commission, but this restriction shall not apply to aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operations of such registered aircraft or to a non-passenger-carrying flight solely for inspection or test purposes authorized by the commission to be made without such certificate of registration or to amateur built aircraft which have met the airworthiness requirements set forth in the rules and regulations promulgated by the commission, and which have been registered by the commission."

Under authority of the foregoing provision a license showing that the craft in question had met the airworthiness requirements of the Utah State Aeronautics Commission had been issued on the craft operated by your Petitioner. It is the position of Petitioner that this license met the requirements of the Civil Aeronautics Act and the Civil Air Regulations relative to certificates of airworthiness. Had it been the intent of the Congress to require that the airworthiness certificates be issued by the Civil Aero-

nautics Authority they would have so stated in the law. However, unless such provision be read into the law it appears that any certificate issued by competent legal authority meets the requirements of the statute and regulations issued pursuant thereto.

It should be remembered in this connection that the statute with which we are dealing is penal in nature and so should be strictly construed. In regard to the construction of penal statutes, the following language is found in paragraph 240 of Crawford, on Statutory Construction.

> "Criminal and penal statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted.
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> "Only those persons, offenses, and penalties, clearly included, beyond any reasonable doubt, will be considered within the statute's operation. They must come clearly within both the spirit and the letter of the statute, and where there is any reasonable doubt, it must be resolved in favor of the person accused of violating the statute; that is, all questions in doubt will be resolved in favor of those from whom the penalty is sought. For example, the word 'carriage' cannot be construed to include automobiles, or 'self-propelled vehicle' to include aircraft. Nor can the court, as a general rule, supply or correct any omission of the legislature regardless of what may be its cause. And it matters not that the court believes that the statute should have been more comprehensive, or that a strict construction produces an undesirable result.

> "Since the power to inflict punishment is vested in the legislature rather than in the courts, there is considerable danger in subjecting criminal or penal statutes to a liberal construction, lest the court invade the province of the legislature. Moreover, the creation of an offense by interpretation may operate to entrap the unwary and ignorant and threaten the rights of the people generally. As is obvious the rule of strict construction largely and properly grows out of the tenderness of the law for the rights of the individual."

It is also a general principle in law that any doubt or ambiguity in a statute should be construed in favor of the Defendant and against the State or the Government. In support of this position, see *United States vs. Sheldon,* 2 Wheat 119; *Harrison vs. Vose,* 9 How. 372; *ex Parte Webb,* 225 United States 663; *Shipp vs. Miller,* 2 Wheat 316, and *Bolles vs. Outing Company,* 175 U. S. 262.

It is evident that if your Petitioner, the Defendant below, is to be held guilty of violating the statute in question, there must be read into the statute the provision that certificates of airworthiness must be issued by the Civil Aeronautics Authority of the United States Government. This requires not only the construction of an ambiguous statute against a Defendant but actually requires legislation by the judiciary, and, therefore, clearly should not be done.

It may be maintained by the Government that the intent of Congress was that such certificate should be issued by the Civil Aeronautics Authority for the reason that any other construction would result in different standards being imposed by different states. While the construction urged by Petitioner may undoubtedly result in differ-

ent standards for different states, there appears to be no good reason why regulations in this regard should be absolutely uniform.

In regard to Air Traffic Rules such as those regulating the lights on planes, the method of passing or the method of landing or taking off at air fields, it is obvious that strict uniformity is desirable wherever aircraft operating in intrastate flights may come in contact with aircraft operating in interstate flights. However, this same argument does not apply in regard to the standards of airworthiness of a craft. So long as a craft is pronounced airworthy by a competent aviation authority, minor variations in standards which naturally would exist even between the judgments of men of recognized authority in their fields should not conceivably affect to a material degree the effect which such craft operating in intrastate commerce could have on interstate commerce.

The task of examining and granting certificates of airworthiness to privately built aircraft is such a comprehensive and difficult job that the Civil Aeronautics Authority has refused even to undertake it and will grant certificates of airworthiness only to aircraft constructed by a commercial builder. On the other hand, the Aeronautics Commissions of the various states, including the State of Utah, make careful examinations of privately built craft to determine their airworthiness and, if it appears that they are airworthy crafts, will grant certificates to them. The Congress undoubtedly foresaw the extensive task it would be for the United States Civil Aeronautics Authority to examine each privately built craft and it may be that it was not intended that the Aeronautics Authority should be compelled to make such an examination, as in-

deed, they do not. But could it have been the intent of Congress to deny the builder of a private plane the right to fly that plane even though it may be a better plane than those turned out by commercial factories? It appears rather that it was the intent of Congress to permit these planes to fly, if in fact they were airworthy and had a certificate of airworthiness from a competent legal authority.

The Act, if given any other interpretation, when considered in connection with the attitude taken by the Civil Aeronautics Authority would, in fact, be class legislation of an arbitrary capricious and unduly discriminatory nature, without a reasonable ground of classification, for the reason that the Civil Aeronautics Authority will not grant certificates of airworthiness to privately built craft, regardless of their degree of excellence.

ARGUMENT II

THE ACT AND REGULATIONS UNDER WHICH JUDGMENT WAS RENDERED AGAINST THE DEFENDANT ARE IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It must be born in mind that this action arises out of alleged violation of peace-time legislation and regulations. It may be admitted for the purposes of this argument that strict and absolute regulation of all aircraft by the federal government during times of war might be necessary and that the Congress, under its war powers, might properly regulate all conditions and circumstances under which civilian planes might be operated. Our problem,

however, concerns only the extent of the federal government's power to regulate and control the movement in intrastate flights of civil aircraft in times of peace.

In the face of the allegations made by your Petitioner, the Defendant below, and admitted by the government for the purpose of its motion for judgment on the pleadings, such motion could have been granted only under the theory that the power of Congress to regulate air commerce, whether it be intrastate or interstate is plenary. Such is quite clearly not the law. The authority granted to Congress to regulate air commerce must be derived from the general grant of power in Section 8, Article 1, of the Constitution of the United States:

> "To regulate commerce with foreign nations among the several states and with the Indian tribes."

No other grant of such power is contained in the federal Constitution. Under the terms of the Tenth Amendment to the Constitution of the United States of America, which reads:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

only those powers which can be derived from the general commerce clause may be exercised by the Congress in regard to air commerce. Any other power is reserved to the states.

Probably no other section of the Constitution has been so often interpreted by the Supreme Court as has the commerce clause. However, so far as your Petitioner is aware this clause has never been considered by this Court in regard

to the regulation by Congress of intrastate flight of aircraft. The general rule, of course, is that Congress may regulate interstate commerce and also may regulate intrastate commerce where that commerce directly and proximately affects interstate commerce. However, as has been pointed out by this Court on many occasions, this power does not extend to the regulation of intrastate commerce which has only an indirect or remote effect upon interstate commerce. If such were allowed, it would entirely defeat the power of the states to regulate commerce within their own borders, for under our present complex commercial system, even the simplest transaction carried on entirely within the borders of a state is apt to have some indirect or remote effect upon interstate commerce. The Supreme Court of the United States, speaking through Mr. Chief Justice Hughes, in the case of *National Labor Relations Board vs. Jones and Laughlin Steel Corporation,* 301 U. S. 1, 81 L. Ed. 893, says:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself establishes by the commerce among the several states and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

In the case of *Ratterman vs. Western Union Telegraph Company,* 127 U. S. 411, the Court quoted with approval its earlier language in the case of *Telephone Company vs. Texas,* 105 U. S. 460, as follows:

> "The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a state and does not affect other nations, or

states or the Indian tribes, that is to say, the purely internal commerce of the state, belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations or states or the Indian tribes, belongs to Congress."

By granting judgment on the pleadings the Defendant was prohibited from introducing evidence to show that the Act and regulations promulgated thereunder, insofar as they related to the locality in which Defendant operated his plane, were arbitrary and unreasonable and that such regulation had no reasonable relationship to the regulation or safety of aircraft being operated in interstate commerce.

It is admitted in this case that Petitioner operated his craft entirely within the borders of the State of Utah. Had he been given an opportunity he would have shown by evidence that he constructed an airworthy craft upon which he sought a license from the Civil Aeronautics Authority of the United States Government, but that the said authority refused even to examine his craft for the purpose of determining its airworthiness. He would further have shown that he purchased a tract of land near his home at Murray, Utah, for the purpose of using the same as a private airport for the operation of his home-built craft. He would have shown that the Civil Airway designated by the Civil Aeronautics Authority through the State of Utah cut a swath 20 miles wide across the state and covered a territory which contains more than half the population of that State, including the area in which he lived and in which his private airfield was located. He would further have shown that the average number of aircraft coming through this Civil Airway in one day of 24 hours was 44. In other words, less than one every 30

minutes. He would further have shown that the control of this huge portion of the air space above Utah was utterly unnecessary to the protection and regulation of these infrequent flights of craft engaged in interstate commerce. He would have shown that the possibility of craft operating in this zone interferring with craft in interstate flight was so remote as to be almost negligible. He would have shown that under the regulation he could not even take off from his own private airfield, circle same entirely within its boundaries, and land again without having violated the act in question.

The opinion of the Circuit Court of Appeals indicates your Petitioner contended that on the trial of the case he could have shown that the flight of his aircraft in the designated civil airway did not in any way endanger or interfere with safety in interstate commerce. Such is not the contention. The contention is that he could have shown, not merely that such flight did not actually endanger or interfere with the safety of interstate commerce, but that the conditions of air commerce in that territory were such that, as indicated above, the chances of his interferring with craft in interstate flight were so remote as to be negligible.

He would further have shown that even though his aircraft was in all respects airworthy, because of the fact that it was a home built craft he could not even take off from his own field and operate his plane over such field; whereas, commercially-built craft much inferior in design are permitted to fly wherever they wish in this airway, merely because the Civil Aeronautics Authority will grant certificates of airworthiness to commercially-built craft, but will

not license home-built craft regardless of their degree of excellence.

If the government can, under the commerce clause, regulate intrastate commerce under conditions such as would have been shown to exist had the Petitioner, the Defendant below, been permitted to produce his evidence as above indicated, then the commerce clause of the federal Constitution must be expanded by interpretation to give the Congress full and complete control over all commerce, both interstate and intrastate. Such is not the holding of the Courts. See *Lewisville N. O. & T. R. Company vs. Mississippi,* 133 U. S. 587; *Mondou vs. New York, N. H. & H. R. Company,* 223 U. S. 1; *Howard vs. Illinois Central Railroad Company,* 207 U. S. 463; *United States vs. DeWitt,* 9 Wall 41; *Milnor vs. New Jersey Railroad and Transportation Company,* 3 Wall 782.

In the case of *Santa Cruz Fruit Packing Company vs. National Labor Relations Board,* 303 U. S. 453, 82 L. Ed. 955, this court, speaking by Mr. Chief Justice Hughes, stated:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *A. L. A. Schechter Poul-*

try Corp. vs. United States, 295 U. S. 495, 546, 79 L. Ed. 1570, 1588, 55 S. Ct. 837, 97 A. L. R. 947. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' Id., p. 554.

"To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

To find "immediacy or directness" would in this case, as in the case of *A. L. A. Schechter Poultry Corporation vs .United States,* supra, be to find it almost everywhere, a result clearly inconsistent with the maintenance of our federal system.

If, under the commerce clause, Congress can permit one of its agencies to choose any territory which it desires and designate the air above such territory as a "civil airway" in which only planes operating under regulations and conditions imposed by the federal government may fly, then, under the guise of such a power, practically all of the activities of the State and its citizens may be regulated. The federal government or its agency could have made the "civil airway" 50 miles wide or 100 miles wide or could have made it wide enough to cover all the air over the State of Utah. Under the theory of the decision of the Circuit Court, the statute and regulations might be changed

so as to limit the height of buildings in a designated airway so that the Federal Government might conceivably go to the extent of saying to the State of Utah: You shall not allow any building or structure in the State of Utah to be higher than 20 stories, or 10 stories, or even 2 stories. If, under the theory of the Circuit Court, the federal government should determine that all air over the State of Utah should be designated as a civil airway and regulation over activities therein taken over by the federal government or its agency, then conceivably it might say to our farmers: You cannot operate or maintain upon your farms derricks which are over 10 feet high.

The above are admittedly extreme and far-fetched cases, but are not beyond the realm of possibility if the federal government's powers to designate civil airways and regulate the activity therein are not in some way limited Where is this line to be drawn? The statute under which judgment was rendered against your Petitioner glibly defines "air commerce" as the "operation or navigation of aircraft within the limits of any civil airway" and permits the government agency to designate any paths which it desires as "civil airways." The statute, under the theory of the Circuit Court's opinion, might be amended to include in the definition of "air commerce," "all activity and operations within the limits of a civil airway."

In the State of Utah, many inventors and amateur aircraft builders are and have been at work on their own properties considerable distances from the routes regularly traveled by planes in interstate commerce, trying to develop, through their inventive genius, advancements in aircraft construction. Having perfected some invention they desire to test it by taking their craft off the ground.

They do not have the means to have their craft tested by commercial builders upon expensive commercial testing fields and testing grounds. They desire to take their planes off the ground and put them into the air to see whether or not their mechanical devices resulting from their inventive labors are practicable. The State of Utah, in order to encourage the development of aviation, is willing to inspect these craft to determine whether they are airworthy, and if so to issue certificates showing such airworthiness.

Can we stretch the powers granted to the federal government by the commerce clause of the federal Constitution to the point where the federal government can say to a citizen of the State of Utah: We recognize that you own property far removed from a regular interstate air route; that you have an airplane approved and licensed and designated as airworthy by the State of Utah; but we will not let you take that plane off the ground any distance at all into the air, because we have designated all of the air in the State of Utah as a civil airway.

If the commerce clause can be stretched to that extent, as it must be if the Act and regulations under which judgment was rendered against the Petitioner are to be upheld, then all rights of the states to regulate their internal affairs must be abandoned to the federal government and the Tenth Amendment may as well be cast aside as an out-worn, out-moded and meaningless part of our Constitution.

We respectfully submit that the broad definition of air commerce and the broad powers to define civil airways as set forth in the Civil Aeronautics Act of 1938, Public No. 706, Seventy-fifth Congress, are not within the scope

and limits of the commerce clause and are such as to render the said Act unconstitutional as being in contravention of the Tenth Amendment to the Constitution of the United States.

Respectfully submitted,

GROVER A. GILES
ZAR E. HAYES,
Attorneys for Petitioner